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IN THE

Supreme Court of the United States

No. 77-6248

JACQUELYN E. HUNTER,

Petitioner,

v.

GERALD WALLACE DEAN, SHERIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR THE PETITIONER

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THE OPINION BELOW

The opinion of the Supreme Court of Georgia (App. 8-13) is reported at 240 Ga. 214, 239 S.E.2d 791 (1977).

JURISDICTION

This Court has jurisdiction of this case under 28 U.S.C. 1257(3) because:

(a) the subject of the Petitioner's claims in the proceedings in the State courts below was her right under the

Equal Protection Clause of the 14th Amendment not to be subjected to an invidious penal discrimination simply on account of her poverty, and

(b) the judgment below was rendered on 28 November 1977 in proceedings for a writ of habeas corpus, a civil action, and the petition for a writ of certiorari, filed on 23 February 1978 and granted on 17 April 1978, was timely under 28 U.S.C. 2101(c) and Rule 23(3) of this Court.

QUESTION PRESENTED

Once a State court has determined that probation is the appropriate punishment for a particular offender in a particular case, may it, consistently with the Equal Protection Clause of the 14th Amendment, bar the offender from probation and require her to serve her sentence in confinement solely because of her involuntary inability to prepay a fine imposed as a condition precedent to probation?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the 14th Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Georgia Laws 1964, p. 496 (Georgia Code Annotated 27-2529): "In any case where the judge may, by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2000 as a condition to such

probation; Provided, such defendant shall not be entitled to any rebate or refund of any part of such fine so paid, in any case such probation shall be revoked by law."

Georgia Laws 1972, pp. 604, 609 (Ga. Code Ann. 27-2709: "The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation . . . ."

Georgia Code Ann. 27-2901: "Every fine imposed by the court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant."

STATEMENT OF THE CASE

On 13 December 1976, the Petitioner, a 17-year old black girl and a first-offender, pleaded guilty to a burglary charge in the Terrell (Georgia) Superior Court, as did a co-defendant.

Prior to pronouncing sentence, the judge asked the defendants if they could pay fines. The father of the co-defendant indicated that he could. The Petitioner indicated that she thought that certain cousins would pay one for her (App. 3).

The judge sentenced them to serve two years in prison but he stipulated that the sentences would be probated upon payment by each of fines of $165, half of the court costs, and $50 as fees for the lawyer that he had designated to assist them (App. 4).

Her co-defendant's fine, his share of the costs, and his attorney's fees were paid and he was released on probation. The Petitioner's were not paid and she remained in custody.

In February 1977, with the assistance of volunteer counsel, she filed in forma pauperis in the Terrell Superior

Court for a State writ of habeas corpus. She challenged her confinement and her exclusion from probation solely for her involuntary inability to prepay her fine and the costs as a violation of her right to the equal protection of the laws despite her indigency (App. 5). Basically, she sought a modification of her sentence so that she could pay those sums in installments during probation.

The trial judge struck the requirement that she pay $50 for attorney's fees but remanded her back to custody under the other provisions of the original sentence (App. 6).[1]

She then filed both a notice of appeal in the State courts and a petition for a writ of habeas corpus in the local District Court. The District Court ordered her released *pendente lite* on her personal recognizance so that she could exhaust her State appellate remedy without fear of mootness.

While her appeal was pending, the Fifth Circuit Court of Appeals ruled in *Barnett v. Hopper*, 548 F.2d 550 (1977) (application for writ of certiorari pending, No. 77-477), that to confine an indigent and to exclude him from probation only for his involuntary inability to prepay a fine violated the Equal Protection Clause. The Supreme Court of Georgia, however, adhered to its prior decisions, rejected the reasoning of the Court of Appeals, and affirmed the denial of relief, *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977) (App. 8-13).

This Court granted a writ of certiorari (App. 14).

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[1] *Sub silentio*, the Superior Court relied upon *Calhoun v. Couch*, 232 Ga. 467, 207 S.E.2d 455 (1974), and *Barnett v. Hopper*, 234 Ga. 694, 217 S.E.2d 280 (1975), cases in which the Supreme Court of Georgia had rejected the equal protection claim under circumstances nearly identical to those in the Petitioner's case.

ARGUMENT

I.

THE APPROPRIATE TEST FOR EXAMINING AN EXCLUSION FROM PROBATIONARY PENAL TREATMENT PURELY ON ACCOUNT OF INDIGENCY IS WHETHER THE EXCLUSION IS NECESSARY TO SECURE A COMPELLING STATE INTEREST.

If, purely on account of her poverty, the Petitioner had been deprived of a grant of probation as the result of a statute which required prepayment of a mandatory fine and costs, there would be little question that her right to the equal protection of the laws had been violated by her harsher treatment. See *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L.Ed. 1655 (1942), *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L.Ed.2d 586 (1970), *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L.Ed.2d 130 (1971). The real issue in this case is whether the State has violated it any differently or any less when it has disqualified her for her poverty at the election of a judge acting in her individual case under his inherent sentencing powers. The fundamental question boils down to whether the sort of sentence an offender must serve may ever explicitly turn solely upon the amount of money he has, cf. *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L.Ed. 891 (1956).

This Court has articulated several standards for analyzing challenges under the Equal Protection Clause, challenges which most familiarly run directly to the terms of legislation which facially or practically establish certain classes or

exclusions. Traditionally, the Equal Protection Clause is offended only if the classification is "without any reasonable basis," *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 55 L.Ed. 369 (1911). This "traditional standard of review... requires only that the State's system be shown to bear some rational relationship to legitimate state purposes," *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973), or that it create no arbitrary or invidious discriminations in view of its objectives, *Skinner v. Oklahoma*, 316 U.S. 535, supra, *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497, 16 L.Ed.2d 577 (1966), *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L.Ed.2d 600 (1972).

However, an exclusion or classification which affects a fundamental right secured by the Constitution evokes a stricter standard of review. It must promote a "*compelling* state interest," *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969), *and* it must also be "reasonably *necessary*" to that end, *Bullock v. Carter*, 405 U.S. 134, 144, 92 S. Ct. 849, 31 L.Ed.2d 92 (1972) (emphasis added).

Similarly, an exclusion or classification based on certain "suspect" criteria imposes upon the State a "heavy burden of justification," *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S. Ct. 283, 13 L.Ed.2d 222 (1964), and it is subject to the same sort of close scrutiny, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed.2d 534 (1971). "In order to justify the use of a suspect classification," this Court summarized in *In re Griffiths*, 413 U.S. 717, 721-23, 93 S. Ct. 2851, 37 L.Ed.2d 910 (1973), "a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'neces-

sary . . . to the accomplishment' of its purpose or safeguarding of its interest" (footnotes omitted).

Although this Court has characterized exclusions based upon wealth as "traditionally disfavored," *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 668, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966), it has stopped short of branding wealth distinctions across the board as "suspect" per se. See *San Antonio Independent School District v. Rodriguez,* 411 U.S. at 29 (majority opinion) and at 102 (Marshall, J., dissenting), supra, *Maher v. Roe,* 432 U.S. 464, 471, 97 S. Ct. 2376, 2381, 53 L.Ed.2d 484 (1977). As it has occasionally pointed out, however, see *Maher v. Roe,* supra at 471 (n. 6), its restraint on the point has not been exhibited in cases involving the administration of criminal justice but in such areas as "economics and social welfare," *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L.Ed.2d 491 (1970) (family ceilings on AFDC payments), a "State's fiscal policies," *San Antonio Independent School District v. Rodriguez,* 411 U.S. at 40, supra (public school financing), and "the allocation of public funds," *Maher v. Roe,* supra at 474 (medicaid expenditures). These are matters which are heavily laden with public policy considerations, which are susceptible to a variety of legitimate approaches, and which require a balancing of diverse interests and priorities. In short, these are areas which are especially within the legislative domain, areas in which it would be impossible to decree "absolute equality or precisely equal advantages," *San Antonio Independent School District v. Rodriguez,* 411 U.S. at 24, supra.

However, long ago in *Griffin v. Illinois,* 351 U.S. 12, supra, this Court effectively made wealth a "suspect" criterion in the administration of criminal justice. There a

plurality identified as "the central aim of our entire judicial system [that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court' [citation omitted]," id. at 17. Clearly joined in basic sentiment by Justice Frankfurter's concurring opinion (in which he labelled a financial barrier to an indigent's direct appeal a "squalid discrimination," id. at 24), the plurality held that "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," id. at 17. "There can be no equal justice," it concluded, "where the kind of trial a man gets depends on the amount of money he has," id. at 19.

"Subsequent decisions of this Court have pointedly demonstrated that the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process," *Williams v. Illinois*, 399 U.S. at 241, supra. See, e.g., *Smith v. Bennett*, 365 U.S. 708, 81 S. Ct. 895, 6 L.Ed.2d 39 (1961), *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L.Ed.2d 811 (1963), *Tate v. Short*, 401 U.S. 395, supra, *Mayer v. City of Chicago*, 404 U.S. 189, 92 S. Ct. 410, 30 L.Ed.2d 372 (1971), *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed.2d 530 (1971).

Furthermore, this Court has also made it clear that the conditional liberty of an offender who has been awarded probation (as the Petitioner was, App. 3, 4) is part of the "liberty" directly secured by the 14th Amendment,[2] *Morrisey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972), *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973).

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[2]It bears emphasis, in this connection, that the Petitioner's liberty interest at stake in this case is not a theoretical one but a vested interest which she can claim at once on payment of the fine and costs.

Accordingly, both because the financial criterion is "suspect" in the administration of criminal justice and because it affects a fundamental liberty interest secured by the Constitution, any probationary scheme which formally barred otherwise entitled indigents from participation by establishing preconditional fines would have to be judged by the strict standard. The State would have to point to a legitimate, substantial, and compelling interest *and* it would have to demonstrate that the financial exclusion was necessary to serve it.

II.

WHEN IT OPERATES TO EXCLUDE AN OTHERWISE ENTITLED INDIGENT, ANY REQUIREMENT THAT A FINE AND COSTS BE PREPAID AS PRECONDITIONS TO PARTICIPATION IN PROBATION IS WHOLLY UNNECESSARY IN VIEW OF THE READY FEASIBILITY OF SUPERVISED INSTALLMENT PAYMENTS.

No detailed speculation or inquiry into the nature of the State's interests in any such exclusionary scheme of probation is necessary at this point[3] nor is it necessary to linger

[3]The interests and purposes behind any such scheme of probation would be particularly obscure if, as was the situation when the Petitioner was sentenced (App. 3), the scheme was indifferent about who paid the fine and what the responsibilities of the offender might be to any third party who paid it. If the State is willing to look beyond the offender's own pocket for satisfaction of whatever interest the fine serves or symbolizes, it would have to justify not only the relevancy of the offender's own personal means but the more dubious relevancy of the wealth—or the generosity—of his relatives and friends.

here over whether there is a rational or compelling connection between them and the financial discrimination.[4] The real crux of the State's problem under the strict test in any event would be to justify the *necessity* for the exclusion in view of the readily feasible and less intrusive alternative of collecting the fine and costs in installments *during* probation as a condition *of* probation. See *Lubin v. Panish*, 415 U.S. 709, 94 S. Ct. 1315, 39 L.Ed.2d 702 (1974), *McLaughlin v. Florida*, 379 U.S. 184, *Griffin v. Illinois*, 351 U.S. 12, *Bullock v. Carter*, 405 U.S. 134, all supra, all of which involve an assessment of necessity in terms of apparent alternatives.

This Court specifically suggested installment payments as a feasible alternative to the requirements of fines in *Williams v. Illinois*, 399 U.S. at 244-45, and *Tate v. Short*, 401 U.S. at 400, supra, cases in which the penalty schemes themselves, in contrast to a system of probation, did not even provide for supervision or regular reports but contemplated

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[4]The State's basic interest in probation is more reformative than punitive. But to the extent that the fine represents a penal interest, "[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence," *Griffin v. Illinois*, 351 U.S. at 17-18, supra. As a punitive device, it is irrational if it may be passed on, with no questions asked, to innocent third parties, see n. 3, supra. As for the reformative interest, a wealth distinction, particularly one which may be freely blurred by third parties, bears no "fair and substantial relation to the object of the legislation," *Reed v. Reed*, 404 U.S. 71, 76, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971). Nor is there any intrinsic reason why the poor as a class (a class which probably is a decent cross-section of our citizenry by any other measure) would be less amenable to or worthy of rehabilitation than the rich, cf. *Bullock v. Carter*, 405 U.S. 134, supra. Finally, as a cost-recoupment measure, incarcerating an indigent simply because he cannot pay at once "obviously does not serve that purpose [but] saddles the State with the cost of feeding and housing him for the period of his imprisonment," *Tate v. Short*, 401 U.S. at 399, supra.

only outright discharge. Considering that probation is designed to place an offender "under supervision . . . until it is deemed that he can become a constructive member of society," *Hunter v. Dean* at App. 10, and can stand on a self-sufficient footing so that he need not resort again to crime, and considering that the apparatus for installment collection already exists,[5] there is utterly no reason why installment payments should not satisfy all of the State's interests at least as well as lump-sum prepayment. See S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS (2nd ed. 1973), p. 218, ABA Sentencing Standards and Procedures (Approved Draft, 1968), § 2.7, Model Penal Code (Proposed Official Draft, 1962), §§ 7.02, 302.

If the State's interest in prepayment is to have the probationer put up a "stake" which he stands to forfeit if he violates the terms of his probation, see *Hunter v. Dean* at App. 12, Ga. Code Ann. 27-2529, that interest could easily be accommodated by requiring that the installment payments be completed early within the term, see Ga. Code Ann. 27-2901. In fact, such an interest would be better served if the supervision under which the installment payments were made assured that the probationer was at least using his own money or assuming the responsibilities of repaying any amounts he borrowed.

If the State's interest is to avoid the added administrative expenses of installment collection, see *Hunter v. Dean* at App. 13, it could quite properly pass those extra costs along

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[5]In Georgia, for example, standard conditions of probation (all of which the Petitioner's sentence included, App. 4) are that the probationer "report to the probation officer as directed," "work faithfully at suitable employment insofar as may be possible," "support his legal dependents to the best of his ability," and "make reparation and restitution" to the victims of his crime, Ga. Code Ann. 27-2711.

to the probationer, cf. *Schlib v. Kuebel,* 404 U.S. 357, 92 S. Ct. 479, 30 L.Ed.2d 502 (1971).

If the State is concerned about "inverse discrimination" against its affluent who would have to pay their fines in lump sum, see *Hunter v. Dean* at App. 10, it could always allow them too the choice of paying in installments. In any case, any such discrimination is a *de minimis* one which evidently escaped this Court's attention when it suggested the installment alternative in *Williams v. Illinois* and *Tate v. Short.* The State certainly has the power to confine an indigent probationer who has refused to pay his fine at all or who has squandered a fair opportunity to make installment payments,[6] *Williams v. Illinois,* 399 U.S. at 243 (n. 19), *In re Antazo,* 473 P.2d 999 (Calif. 1970).

Essentially, however, any objection of "inverse discrimination" has missed the point that an alternative of installment payments is an accommodation necessary only to give the indigent the *same* effective choice open to a man of means whenever a money price has been placed on their liberty, see *Barnett v. Hopper,* 548 F.2d 550, 553-54, *In re Antazo,* 473 P.2d 999, 1003-04, supra. If a man of means goes to prison because he was not allowed to make installment payments, he has at least exercised a real choice; the comparably situated indigent who goes to prison because he cannot pay a lump sum has only a wholly "illusory choice," *Williams v. Illinois,* 399 U.S. at 242.

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[6]The Petitioner has made no claim that she should be exempt from a fine altogether (see App. 7). Nor is there any challenge in this case to propriety of including a fine as part of her punishment. See *Durst v. United States,* ____ U.S. ____, 98 S. Ct. 849, 55 L.Ed.2d 14 (1978).

III.

EVEN UNDER THE TRADITIONAL "RATIONAL CONNECTION" TEST, THE STATE COULD NOT JUSTIFY BARRING AN INDIGENT FROM PROBATION SOLELY ON ACCOUNT OF HIS POVERTY.

Even under the traditional test which has no regard for necessity, there is certainly a no more rational connection between an offender's wealth (or that of his relatives and friends), or any greater relevancy between wealth and the beneficient purposes of probation, than there is between affluence and qualifications to vote or to run for public office, cf. *Lubin v. Panish*, 415 U.S. 709, *Bullock v. Carter*, 405 U.S. 134, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, supra. Compare *Marshall v. United States*, 414 U.S. 417, 94 S. Ct. 700, 38 L.Ed.2d 618 (1974).

As the Attorney General's *Survey of Release Procedures* (vol. II, p. 237) observed in 1939:

> . . . . In many ways the emphasis on the pecuniary aspects of probation may be undue. Certainly in no case should the foremost consideration in the court's decision to grant or deny probation be the defendant's ability to furnish funds for prerequisite costs, bonds, or fines. Success on Probation cannot be measured in terms of the defendant's financial resources at the time the question of probation is being determined. Often poverty alone may have caused the defendant's lapse from grace. . . .
>
> It is only where terms as to costs, bonds, and fines operate as conditions affecting eligibility and not as

conditions to be complied with during the period that their merit is doubtful. . . .

Elsewhere the *Survey* related (pp. 222-23):

[T]he purpose of probation will be defeated from the very outset if those who would otherwise be good probation material fail to meet the initial requirement of costs because of their poverty. The existence of such a requirement lends weight to the oft-repeated charge that American administration of criminal justice favors the rich over the poor because many persons who might otherwise succeed on probation are denied its benefits for lack of funds. . . . Neither the effect such a lawwill produce on the minds of those denied their liberty, nor the less immediate outcome of the failure to attempt rehabilitation are salutary for society.

If there is a "rational connection" between poverty and probation in the sense that an indigent probationer might be tempted by his poverty into committing further crimes, to require a fine at all which might deplete resources already strained to desperation hardly reflects that concern. Nor does it serve that concern to drive him into the unsupervised debt of others whose motives and interests might not be the same as the State's. Rather it makes far more sense to exact any fine in a flexible manner and in controlled installments from earned income so that no offender need be driven to further crimes because the very fine which was designed to demonstrate that he would not need to steal has in fact exhausted his means of an honest living. See ABA Sentencing Standards and Procedures, §2.7, Model Penal Code, §7.02.

No inquiry into any conceivable rational connection between poverty and probation could be valid without also considering the countervailing effect on the overriding goals

of our whole criminal justice system when an offender is barred from probation and relegated to prison because he cannot pay a fine.

Regardless of any nice theoretical justifications, when the very same sentence means comparative liberty for one man and prison for his indigent confederate, it does not foster a public perception of justice as a moral force which transcends the values of the marketplace. It does not encourage public respect for the neutrality of the law or its blindness to privilege and influence. It does not look fair, and that is a very precious sacrifice.

To the very great extent that the State's ultimate goals depend upon the offender's own belief that the State has treated him fairly, confining an indigent under such circumstances is less apt to make him a better citizen than simply locking him up outright without constantly taunting him for his poverty. It undermines all of the accepted purposes of punishment, retribution, rehabilitation, and deterrence (see *United States v. Brown*, 381 U.S. 437, 458, 85 S. Ct. 1707, 14 L.Ed.2d 484 [1965]), with no apparent purpose which he could be expected to appreciate. By deflecting the cause of his confinement from his crime to his poverty, it destroys the attitude basic for any real rehabilitation. By encouraging him to think that he has been punished more severely only because he is poor and that it is society which owes him a debt for the discrimination done him, his confinement defeats the deterrent interest. With leisure to compare the probation he could have served but for his poverty, the retribution will invariably seem as excessive as it appears senseless. Confined purely for his inability to pay a fine, a far worse man is bound to leave prison than the man who entered it once when "the ends of

justice and the welfare of society did not require [him to] presently suffer the penalty imposed by law" for his crime, Ga. Code Ann. 27-2709. That too would be a precious sacrifice.

In the last analysis, no "rational connection" in the abstract between a preconditional fine and probation could offset the irrational connection between it and the purposes of punishment and the appearance of fairness which both the public and the offender perceive.

IV.

WHAT THE STATE MAY NOT ACCOMPLISH DIRECTLY, IT MAY NOT ACCOMPLISH INDIRECTLY THROUGH ITS JUDICIARY.

The Petitioner's exclusion from probation was not the product of any State statutory policy. It did not arise from the inexorable operation of a statute which, by requiring her to pay a mandatory fine and costs, placed her in a disadvantaged class. Rather her exclusion was the result of an individual exercise of sentencing discretion. Although, in the name of the State of Georgia, the sentencing judge unimpeachably determined that the State's penal interests did not require her incarceration, she must nevertheless suffer imprisonment because she cannot prepay the fine which he also chose to impose. Functionally, the trial court's judgment that she was "not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that [she] . . . suffer the penalty imposed by law," Ga. Code Ann. 27-2709, was the

equivalent of the legislated judgments which framed *Williams v. Illinois*, 399 U.S. 235, and *Tate v. Short*, 401 U.S. 395, supra. For equal protection purposes, considering that she could begin her probation today but for her indigency, the fact that the problem in this case was judicially created is constitutionally insignificant.

The Equal Protection Clause does not restrain only legislated judgments and actions. It reaches the judgments and actions of the State through *any* of its organs, including the judiciary, *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed.2d 1161 (1948). Furthermore, it protects individuals as well as classes and its guaranty fully extends to discretionary action under concededly valid statutes,[7] *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796 (1957), *Barnett v. Hopper*, 548 F.2d 550, *In re Antazo*, 473 P.2d 999, supra.

This Court eloquently stated the controlling principle in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L.Ed. 220 (1886):

> Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by the public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

It is in the wide sentencing discretion traditionally accorded the States and trial judges in general that Georgia has sought to refuge for the "squalid discrimination"

[7]There is nothing inherently invalid about the statutory framework in which this case has arisen. Fines are not mandatory conditions, Ga. Code Ann. 27-2709, 27-2529, and the courts may allow a "reasonable time" for payment, Ga. Code Ann. 27-2901. See *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L.Ed.2d 642 (1974).

practiced on the Petitioner in this case. See, e.g., *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L.Ed. 1337 (1949), *Williams v. Oklahoma*, 358 U.S. 576, 79 S. Ct. 421, 3 L.Ed.2d 516 (1959), *Pennsylvania v. Ashe*, 302 U.S. 51, 58 S. Ct. 59, 82 L.Ed. 43 (1937), *Williams v. Illinois*, 399 U.S. at 241-42. Within this wide discretion, the State's argument runs, the sentencing judge could have quite properly considered the Petitioner's ability to prepay a fine, together with a myriad of other matters, as a legitimate qualification for probation. He could do so without regard to normal equal protection principles which would operate if the very same thing had been accomplished directly under the terms of a statute. As the Supreme Court of Georgia put it (at App. 10):

> [T]he ability of a defendant to pay a fine is often a factor for the sentencing judge to consider in assessing the likelihood that the defendant will serve a term of probation without violation. Stated in another fashion, a conditionally probated sentence is not necessarily [an] invidious discrimination based on wealth if the sentencing judge has determined that a defendant would not be a good candidate for probation unless a fine is paid first.

Stated in yet another fashion, this argument is that because the sentencing judge has the discretion not to award probation at all, no one else can question any invidious precondition he might attach to it. But in any case the State's problem remains the same: the judge did award the Petitioner probation, evidently because he thought that she was a good probation risk, and whether she or her relatives or friends can pay one fine or a dozen has no apparent bearing on her essential character. She goes to prison as the same person who, but for a small amount of money, could

walk out of the probation office. If she was a poor risk for probation, she should not have been awarded probation in the first place.

As a general proposition, there are also several fundamental problems with the view of sentencing discretion as some sort of talismanic license in itself rather than as a means of doing justice by accommodating the relevant facts and circumstances of each case and the needs and characteristics of each individual offender. See *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976). As a license to override public and constitutional policy by singling out and excluding indigents from ameliorated treatment and rehabilitation, it would, if unchecked, permit the States "to accomplish indirectly" through the judiciary "that which cannot be done directly" under the Equal Protection Clause, *Williams v. Illinois*, 399 U.S. at 243; cf. *Yick Wo v. Hopkins*, 118 U.S. 356, supra, for a judge could just as logically and with complete impunity impose explicitly discriminatory sentences on the basis of race, religion, alienage, or any other criteria clearly condemned by the Constitution.

Sentencing discretion has recognized limits, e.g., *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L.Ed.2d 592 (1972), *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969); cf. *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L.Ed.2d 758 (1962). The Equal Protection Clause is certainly among them, *Williams v. Illinois*, 399 U.S. 235, *Tate v. Short*, 401 U.S. 395. Neither the width of that discretion nor the complexities of exercising it is any reason to lay aside the pledge of equal justice, which is the foundation of our system of criminal justice, or to tolerate an exercise of it

when, "with an evil eye and an unequal hand," *Yick Wo v. Hopkins*, 118 U.S. at 173, it has isolated an invidious and forbidden factor and turned the very question of liberty upon it.

The State has also suggested that in the Petitioner's case, since the judge was aware that she was looking to relatives to pay the fine for her (App. 3), he could have considered the preconditional fine as a valid indicator of the family's confidence in her and of their "added control" in a probationary program, *Hunter v. Dean* at App. 12. The serious problem is that the family's payment of a fine could just as validly indicate an excessive, detrimental indulgence or a pattern of buying the offender out of trouble. Conversely, the family's failure to pay need not necessarily indicate any lack of confidence, disinterest, or unwillingness to assume "added control." It may only indicate that the family is poor or that they believe that the offender should begin to shoulder his own responsibilities. In this connection, the preconditional fine is no adequate substitute for a pre-sentence investigation.

The fact that the financial discrimination in this case was filtered through a court of law does not change its essential character. "[T]he denial of equal justice is still within the prohibition of the constitution," *Yick Wo v. Hopkins*, 118 U.S. at 374, supra.

V.

THE PETITIONER HAS DONE NOTHING TO FORFEIT HER CLAIM TO THE EQUAL PROTECTION OF THE LAWS IN THIS CASE.

The State has suggested finally that the Petitioner "misle[d] the court as to her ability to pay a fine, [and] thus induc[ed] an alternative sentence," *Hunter v. Dean* at App. 13. For that reason the Court below indicated that she should therefore be estopped from "later seek[ing] to rely upon constitutional safeguards to avoid punishment," id.

The record does not reflect that the Petitioner misled the trial judge in any fashion or that she induced him to do anything. He was satisfied enough with her indigency to name counsel for her (Arraignment Transcript, pp. 3-5) and to enforce his fee under the auspices of the State (App. 3, 4). The Petitioner made it quite plain that she was relying on others to pay her fines for her. Furthermore, the judge asked her only *if* she could pay a fine, not whether she could pay one in lump sum immediately (App. 3).

There is no basis in the record, no detriment to the State's interests, which would justify barring the Petitioner's recourse to the equal protection of the laws when her cousins failed to help her. Compare, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977).

Finally, the Petitioner was not invoking her "constitutional safeguards to *avoid* punishment." She invoked them to *secure* the very punishment, probation, which the Superior Court awarded her when it thought that her cousins would pay her fine.

VI.

THE PRINCIPLE OF THE *WILLIAMS* TRILOGY SHOULD CONTROL THE JUDGMENT BELOW.

Although the Supreme Court of Georgia correctly observed that their facts were distinguishable and their stated holdings narrow, the essential principles which this Court announced in *Williams v. Illinois*, 399 U.S. 235, *Morris v. Schoonfield*, 399 U.S. 508, 90 S. Ct. 2232, 26 L.Ed.2d 773 (1970), and *Tate v. Short*, 401 U.S. 395, unmistakably control this case.

Williams, *Morris*, and *Tate* all dealt with legislated penalty schemes, the familiar grist of the mills of equal protection, which established on their faces "the outer limits of incarceration necessary to satisfy [the States'] penological interests and policies," 399 U.S. at 242, but which went further to provide that unpaid fines be worked off through additional confinement. This Court held that equal protection prohibited the States "from jailing an indigent for failing to make immediate payment of any fine . . .whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine," 399 U.S. at 509, 401 U.S. at 398. In view of the alternatives, particularly the alternative of installment payments, the States could not convert unpaid fines into imprisonment and thereby inflict harsher penalties purely for poverty.

When the sentencing judge, in his discretion, awarded the Petitioner probation, he established for the State the "outer limits of incarceration necessary to satisfy [Georgia's] penological interests and needs" in her individual case

every bit as conclusively as the legislatures had done for the classes of cases involved in the *Williams* trilogy. When he set the financial barrier before her and refused to modify it to accommodate the indigency which barely distinguished her from her co-defendant, he in effect required her incarceration not because she was more culpable or less worthy than she was before but only because of her indigency. His action was no less invidious for being judicial.

Georgia was no more required to establish a system of probation than to establish a system of direct criminal appeals, *Griffin v. Illinois*, 351 U.S. 12, but it did. The sentencing judge was no more required to sentence the Petitioner to probation than he was to sentence her to any other authorized punishment, but he did. Having done these things, the Equal Protection Clause restrains the State of Georgia from excluding the Petitioner, or any indigent, solely because she cannot pay a discretionary toll.

CONCLUSION

This Court should reverse the judgment below and require Georgia to accommodate the effect of the Petitioner's indigency upon the privileges accorded her by her sentence by permitting her to pay her fine and the costs in reasonable installment payments.

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